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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
AND
GENERAL AND INHERENT JURISDICTION

FOREIGN ADOPTION PETITION NO.89 OF 2007

Robert Heijkamp and his wife .
Astrid Jacoba Maria Heijkamp Wagensveld, .
both Netherlands Nationals, residing at .
Havezatedrift 37, 3436 CC, Nieuwegein, .
The Netherlands through their Constituted .
Attorney: Harsha Sheth, Bal Anand World .
Children Welfare Trust, India, Chembur, .
Mumbai - 400 071. ...Petitioners

V/s.

Bal Anand World Children Welfare Trust, .
India, Chembur, Mumbai - 400 071. ...Respondents

WITH

FOREIGN ADOPTION PETITION NO.98 OF 2007

Michiel Everardus Hendrikus Opgenoort & .
Annemarie Henrica Dek, both Netherlands .
Nationals, both residing at Haagwag 210, .
2324 NB Leiden, The Netherlands through .
their duly constituted attorney .
Ms.Harsha Sheth, C-1/89, Vrindavan .
Society, LBS Marg, Ghatkopar West, .
Mumbai - 400 086. ...Petitioners

WITH

FOREIGN ADOPTION PETITION NO.108 OF 2007

Tomasoni Francesco and his wife .
Vavassori Silviana Carmen, both Italian .
Nationals, residing at Via Pizzo Camino 3, .
Dalmine (BG), Italy through their .
constituted attorney Mrs.Indu Mehta, Asha .
Sadan Rescue Home, Umerkhadi, Mumbai-9 ...Petitioners

V/s.

Asha Sadan Rescue Home, Asha Sadan Marg, Umerkhadi, Mumbai - 400 009. ...Respondents

Ms.Dipal Sanjanwala Mehta, Advocate, for the Petitioners.

Mr.O.H. Hareendran, Representative of ICSW present.

Ms.Madhubala Kajle, AGP, for the State.

Ms.Ghone and Mrs.S. Srikrishna - amicus curiae.

CORAM : S.J. VAZIFDAR, J.

DATED : 3RD OCTOBER, 2007.

ORAL JUDGMENT :

1. The petitions raise common questions and are therefore disposed of by this common judgment and order. For convenience I will refer to the facts in Foreign Adoption Petition No.89 of 2007.

2. The Petitioners, husband and wife, are Dutch nationals. They have been sponsored as suitable adoptive parents by their Government agency. They applied to the Dutch sponsoring agency for adoption and through it applied to the Respondents. The Respondent is a Trust recognized by the Government as a Child Welfare Organization.

. The Respondents are the custodians of a female

minor born on or about 13-11-2004.

3. The Petitioners have sought an order for their appointment as guardians of the person of the child now in the custody of the Respondents. The Petitioners have also sought dispensation of the notice under Section 11 of the Guardians and Wards Act, 1890.

4. The Petitioners submitted their documents to the Central Adoption Resource Agency (hereinafter referred to as "CARA"), an autonomous body, under the Ministry of Women and Child Development, Government of India.

5. As per the certificate issued by the Child Welfare Committee (hereinafter referred to as the "CWC") dated 13-9-2006, the child’s mother is an inmate of the Beggar’s Home for Women. The child was born on 13-11-2004 when her mother was an inmate of the Beggar’s Home. The mother is stated to be suffering from psychosis and therefore not in a position to take care of her child.

. The child was brought before the CWC by the Probation Officer of the Beggar’s Home for Women,

Chembur, Mumbai, on 2-9-2005 and was placed in the custody of the Respondents for her further care.

6. Even after publication in newspapers, no one has come forward to claim the child. The CWC, therefore, declared the child legally free for adoption and has recorded its no objection for her suitable rehabilitation. The CWC further declared the child destitute and legally free for adoption under Section 39 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as the "JJ Act") and ordered the child to be continued to be kept in the care and custody of the Respondents for a further period of three years for her maintenance and further rehabilitation.

7. The Voluntary Co-ordinating Agency (hereinafter referred to as the "VCA") by its certificate dated 12-12-2006 has stated the medical problems of the child and that no suitable Indian family was willing to adopt her.

8. CARA has also issued a no objection certificate on 10-5-2007 stating that it was satisfied that the necessary procedure had been properly

followed.

9. When the matter was taken up for consideration, I was not inclined to grant the order in view of the Doctor’s certificate referred to in the CWCs said certificate dated 13-9-2006 stating that the child’s mother was suffering from mental retardation and psychosis for which she was under treatment and was not in a position to look after the child at present.

. In view thereof, it was necessary to consider the legal requirements for granting an order of guardianship or adoption in respect of a child whose parent is mentally ill. I have come to the conclusion that the CWC has no power to either consider or declare a person to be mentally ill even on the basis of doctors certificates. I have also come to the conclusion that the CWC is not entitled to even consider a person to be mentally ill even on the basis of doctors certificates. The determination of the mental health of a person is governed by the provisions of the Mental Health Act, 1987.

10. In view of the importance of this question, I requested Ms.Ghone and Mrs.Srikrishna to appear as

amicus-curiae. They have been furnished all the papers. Before going further I must express my gratitude to both the learned amicus-curiae for the valuable assistance rendered by them.

11. I had also directed the State Government, to indicate specifically their stand in such cases. Understandably, the State Government requested for time to consider the matters stating that they would also consult the learned Advocate General. Time was sought by and granted to all the parties including the State Government to consider the matters.

12. In the above Petitions while there are Doctor’s certificate stating that the mothers of the children are not mentally sound, there is no order of a Court of competent jurisdiction declaring them to be so.

13. The heading of Chapter VI of the Mental Health Act, 1987 which contains Sections 50 to 77 reads :

> *"Judicial Inquisition Regarding Alleged Mentally Ill Person Possessing Property, Custody of His Person and Management of His Property."*

. The title, however, does not indicate the full

scope of the Sections within the chapter as I will presently demonstrate.

14. Section 50 clearly deals with those cases where the mentally ill person is possessed of property. Section 50 provides that where a mentally ill person is possessed of property, an application for holding an inquisition into the mental condition of such person may be made by his relatives, a public curator appointed under the Indian Succession Act or by the Advocate General of the State in which the alleged mentally ill person resides or where the property comprises land or interest in land or where the property or part thereof is of such a nature as can lawfully be entrusted for management to a "Court of Wards" established under any law for the time being in force in the State, by the Collector of the District in which such land is situate, to the District Court within the local limits of whose jurisdiction the alleged mentally ill person resides. Sub-section (2) provides for the service and the manner of service of notice of the application on the mentally ill person or on the persons having the custody of such person with a direction to produce the person before the Court.

. Section 51 provides that on completion of the inquisition, the District Court shall record its findings on whether the alleged mentally ill person is in fact mentally ill or not and where such person is mentally ill, whether he is incapable of taking care of himself and of managing his property, or incapable of managing his property only.

. Section 52 provides that where the District Court records a finding that a person is in fact mentally ill and incapable of taking care of himself and of managing his property, it shall make an order for the appointment of a guardian under Section 53 to take care of his person and of a manager under Section 54 for the management of his property.

. Sections 55 to 64 provide for the appointment of managers in certain other circumstances and the appointment, duties, powers and remuneration of guardians and managers.

15. Section 65 of the Mental Health Act reads as under :-

"65. Power to make order concerning any matter connected with mentally ill

> **person -** The District Court may, on an application made to it by any person concerning any matter whatsoever connected with the mentally ill person *or his property, make such order, subject to the provisions of this Chapter, in relation to that matter as in the circumstances it thinks fit."* (emphasis supplied).

16. Sections 50 to 64 make detailed provisions regarding the manner in which the property of a mentally ill person is to be safeguarded. It would be noticed immediately that Section 65 confers wider powers on the District Court than the preceding sections of Chapter VI. The scope and ambit of Section 65 is obviously not limited to the property of the mentally ill person.

. This is clear from the expression: "concerning any matter whatsoever connected with the mentally ill person or his property".

. These words establish that the exercise of power under Section 65 is not limited to the property of the mentally ill person but extends to "any matter whatsoever connected with the mentally ill person or his property." This is further clear from the words "or his property" which follow the words "any matter whatsoever connected with the mentally ill person." A

conclusion to the contrary would render the words "or his property" otiose.

17. The other distinction between Section 65 and the preceding Sections of Chapter VI is that an application under Section 65 can be made by any person and not just the persons / authorities mentioned in Section 50.

18. I am, therefore, in agreement with the submission that there is no warrant for limiting the scope of Section 65 of the Mental Health Act. The submission, therefore, that Section 65 was enacted to deal with situations not falling within the previous Sections is well founded. As rightly submitted by Ms.Ghone, Section 65 confers a general power on the District Court to pass appropriate orders including for the appointment of a guardian of a mentally ill person who does not possess property.

19. The appointment however would, as provided by Section 65 itself, be subject to the provisions of Chapter VI. For instance the District Court while considering an application for the appointment of a guardian in respect of a mentally ill person would have

to hold an inquisition into the mental condition of the person in the manner prescribed by Section 50 and record a finding as required by Section 52.

20. Sections 52 and 53 of the Mental Health Act read as under :-

> *"***52. Provision for appointing guardian of mentally ill person and for manager of property** - (1) Where *the District Court records a finding that the alleged mentally ill person is in fact mentally ill and is incapable of taking care of himself and of managing his property, it shall make an order for the appointment of a guardian under section 53 to take care of his person and of a manager under section 54 for the management of his property.*
>
> *(2) Where the District Court records a finding that the alleged mentally ill person is in fact mentally ill and is incapable of managing his property but capable of taking care of himself, it shall make an order under section 54 regarding the management of his property.*
>
> *(3) Where the District Court records a finding that the alleged mentally ill person is not mentally ill, it shall dismiss the application.*
>
> *(4) Where the District Court deems fit, it may appoint under sub-section (1) the same person to be the guardian and manager.*
>
> **53. Appointment of guardian of mentally ill person** - (1) Where the *mentally ill person is incapable of taking care of himself, the District*

> *Court or, where a direction has been issued under sub-section (2) of section 54, the Collector of the District, may appoint any suitable person to be his guardian.*
>
> *(2) In the discharge of his functions under sub-section (1), the Collector shall be subject to the supervision and control of the State Government or of any authority appointed by it in that behalf."*

. The use of the word "shall" in Section 52 is not conclusive of the matter. Considering the scheme of the Act, I am inclined to read the word "shall" in Section 52(1) as "may". Firstly, Section 53(1) states that the District Court or the Collector, as the case may be, "may" appoint any suitable person to be his guardian. Secondly, upon the finding that a person is mentally ill, the District Court is also entitled to pass an order under Section 26 of the Act which reads as under :-

> *"***26. Admission as inpatient after inquisition** - If any District Court *holding an inquisition under Chapter VI regarding any person who is found to be mentally ill is of opinion that it is necessary so to do in the interests of such person, it may, by order, direct that such person shall be admitted and kept as an inpatient in a psychiatric hospital or psychiatric nursing home and every such order may be varied from time to time or revoked by the District Court."*

21. Thus the District Judge is not bound to appoint a guardian upon a finding that a person is mentally ill. To appoint or not to appoint a guardian is in the discretion of the District Judge to be exercised depending on the facts and circumstances of the case.

22. An order under Section 53 appointing a guardian of the mentally ill person would not result in such person also being the guardian of the mentally ill person’s child or children. Sections 52 and 53 clearly stipulate that the guardian is to be appointed of "his person" meaning thereby the mentally ill person. It does not provide for the appointment of such guardian as the guardian of the children of the mentally ill person. This would be so even if a manager is appointed of the property of the mentally ill person under Section 54. Needless to state that children are not property.

23. Further under Section 58(1), a guardian or a manager has the care of the mentally ill person or his property or of both but are responsible only for the maintenance of the mentally ill person and of such members of his family as are dependant on him. In

other words, the guardian or the manager is responsible for the maintenance of the members of the family dependant on the mentally ill person and do not have control over or in respect of such persons.

24. Thus a guardian of a mentally ill person would not be entitled to initiate or agree to the adoption or the appointment in respect of the child of a mentally ill person.

25. A view to the contrary would be adding to the words of the section with the most startling consequences. For instance, it would entitle such guardian or manager to deal not only with the property of the mentally ill person but also with the properties of the persons dependant on him. This certainly is not and could not have been the intention of the legislature. A person dependant on a mentally ill person may be a major and would, therefore, be entitled to deal with his property without the interference of any other person. The status of the person he is dependant on as a mentally ill person cannot possibly deprive him of his right in respect of his property.

26. As I shall demonstrate, the declaration of a

person as being mentally ill is one of the necessary steps before an application for the adoption or the appointment of a guardian in respect of the child of such person.

27. It is now necessary to consider the provisions of the JJ Act.

28. Section 29 of the JJ Act requires the State Government to constitute a Child Welfare Committee for exercising powers and discharging duties conferred on such Committees in relation to a "child in need of care and protection" under the said Act. Section 2(d) of the JJ Act reads as under :-

> "**2. Definitions -** In this Act, unless the context otherwise requires, -
>
> *2(d). "child in need of care and protection" means a child, -*
>
> *(i) who is found without any home or settled place or abode and* without any ostensible means of subsistence,
>
> (i-a) who is found begging, or who is either a street child or a working child,
>
> *(ii)* who resides with a person *(whether a guardian of the child or not) and such person -*

(a) has threatened to kill or injure the child and there is a reasonable likelihood of the threat being carried out, or

(b) has killed, abused or neglected some other child or children and there is a reasonable likelihood of the child in question being killed, abused or neglected by that person,

(iii) who is mentally or physically challenged or ill children or children *suffering from terminal diseases or incurable diseases having no one to support or look after,*

(iv) who has a parent or guardian and such parent or guardian is unfit or incapacitated to exercise control over the child,

(v) who does not have parent and no one is willing to take care of or whose parents have abandoned or surrendered him or who is missing and run away child and whose parents cannot be found after reasonable inquiry,

(vi) who is being or is likely to be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal acts,

(vii) who is found vulnerable and is likely to be inducted into drug abuse or trafficking,

(viii) who is being or is likely to be abused for unconscionable gains,

(ix) who is victim of any armed conflict, civil commotion or natural calamity."

29. A child of a mentally ill person would come

within the ambit of Section 2(d)(iii) and (iv) and in certain cases also under Section 2(d)(ii).

30. Section 30 sets out the procedure to be adopted by the CWC including for the production of a child in need of care and protection and the placement of such child in safe custody when the Committee is not in session.

31. Section 31 of the JJ Act reads as under :-

> "**31. Powers of Committee -** (1) The *Committee shall have the final authority to dispose of cases for the care, protection, treatment, development and rehabilitation of the children as well as to provide for their basic needs and protection of human rights.*
>
> *(2) Where a Committee has been constituted for any area, such Committee shall, notwithstanding anything contained in any other law for the time being in force but save as otherwise expressly provided in this Act, have the power to deal exclusively with all proceedings under this Act relating to children in need of care and protection."*

32. Section 32 provides that a child in need of care and protection may be produced before the CWC, inter-alia, by a registered voluntary organization or by such other voluntary organization or an agency as

may be recognized by the State Government.

33. Section 33 of the JJ Act provides for the mode of inquiry by the CWC. Section 33 of the JJ Act reads as under :-

> *"***33. Inquiry** - (1) On receipt of a *report under section 32, the Committee shall hold an inquiry in the prescribed manner and the Committee, on its own or on the report from any person or agency as mentioned in sub-section (1) of section 32, may pass an order to send the child to the children's home for speedy inquiry by a social worker or child welfare officer.*
>
> *(2) The inquiry under this section shall be completed within four months of the receipt of the order or within such shorter period as may be fixed by the Committee;*
>
> *Provided that the time for the submission of the inquiry report may be extended by such period as the Committee may, having regard to the circumstances and for the reasons recorded in writing, determine.*
>
> (3) The State Government shall review the pendency of cases of the Committee at every six months, and shall direct the Committee to increase the frequency of its sittings or may cause the constitution of additional Committees.
>
> *(4) After the completion of the inquiry, if, the Committee is of the opinion that the said child has no family or ostensible support or is in continued need of care and protection,*

it may allow the child to remain in the children's home or shelter home till suitable rehabilitation is found for him or till he attains the age of eighteen years."

34. Chapter IV of the JJ Act deals with the rehabilitation and social reintegration. Sections 40 and 41 which fall within this Chapter are important and read as under :-

*"***40. Process of rehabilitation and social reintegration -** The *rehabilitation and social reintegration of a child shall begin during the stay of the child in a children's home or special home and* the rehabilitation and social reintegration of children shall be carried out alternatively by (i) adoption, (ii) foster care, (iii) *sponsorship, and (iv) sending the child to an after-care organisation.*

41. Adoption - (1) The primary *responsibility for providing care and protection to children shall be that of his family.*

(2) Adoption shall be resorted to for the rehabilitation of the children who are orphan, abandoned or surrendered *through such mechanism as may be prescribed*,

(3) In keeping with the provisions of the various guidelines for adoption issued from time to time, by the State Government or the Central Adoption Resource Agency and notified by the Central Government, children may be given in adoption by a Court after satisfying itself regarding the investigations having been carried out, as are required for giving such

children in adoption.

(4) The State Government shall recognize one or more of its institutions or voluntary organizations in each district as specialised adoption agencies in such manner as may be prescribed for the placement of orphan, abandoned or surrendered children for adoption in accordance with the guidelines notified under sub-section (3):

Provided that the children's homes and the institutions run by the State Government or a voluntary organization for children in need of care and protection, who are orphan, abandoned or surrendered, shall ensure that these children are declared free for adoption by the Committee and all such cases shall be referred to the adoption agency in that district for placement of such children in adoption in accordance with the guidelines notifed under sub-section (3).

(5) No child shall be offered for adoption -

(a) until two members of the Committee declare the child legally free for placement in the case of abandoned children,

(b) till the two months period for reconsideration by the parent is over in the case of surrendered children, and

(c) without his consent in the case of a child who can understand and express his consent.

(6) The Court may allow a child to be given in adoption -

> *(a) to a* person irrespective of marital status; or
>
> *(b) to parents to adopt a child of same sex irrespective of the number of living biological sons or daughters*; or
>
> (c) to childless couples."

35. The provisions of the JJ Act thus make it amply clear that one of the modes of rehabilitation provided by the legislature is by adoption of children who are abandoned or surrendered through such mechanism as may be prescribed. Sub-section (3) of Section 41 mandates that the procedure for the same as stipulated from time to time must be followed and the Court must satisfy itself regarding the investigations having been carried out.

36. The question that falls for consideration is whether a child of a mentally ill person falls within the ambit of the JJ Act. In my opinion, the question must be answered in the affirmative. In my opinion a child of a mentally ill person would be deemed to be abandoned within the meaning of this expression in Section 41 of the JJ Act. The reading of the aforesaid provisions together supports this view.

37. For instance, Section 32 provides for any child in need of care and protection being produced before the CWC. Section 33 provides that on receipt of a report under Section 32, the CWC shall hold an inquiry. Sub-section (4) of Section 33 further provides that after completion of the inquiry if the CWC is of the opinion that "the said child", meaning thereby a child in need of care and protection has no family or ostensible support or is in continuous need of care and protection, it may allow a child to remain in the children’s home till suitable rehabilitation is found for him. Thus, the child that continues to remain in the children’s home under Section 33(4) is obviously a child in need of care and protection as Section 33 is in furtherance of Section 32 which expressly deals with such children. Section 33(4) also provides for suitable rehabilitation of such children. One of the modes of such rehabilitation as provided under Section 40(1) is by adoption.

38. The term "abandoned" has not been defined in the Act. The term "abandoned" must however receive a wide interpretation atleast to include within its ambit

children of a mentally ill person for due to the unfortunate circumstances of their parents' mental illness they are for all practical purposes abandoned. Their parents cannot provide for them materially or emotionally or otherwise.

39. Having said that I hasten to add that it would be necessary for the CWC to satisfy itself clearly in each case whether the abandonment is likely to be only temporary or whether it is likely to be of a longer duration. Indeed even this conclusion would be subject to the decision of the Court in such matters. The CWC cannot on its own come to this conclusion. The mental illness of a person can only be determined under the provisions of the Mental Health Act or any other statutory enactment providing for such determination. There is no provision in the Juvenile Justice Act or in any other law which confers any power statutory or otherwise on the CWC to determine whether a person is mentally ill or not.

40. The decision the CWC comes to in regard to the mental health of the parents of a child would

necessarily be based upon the determination of the same by the concerned Court / authorities under the Mental Health Act. If therefore for instance the Court under the Mental Health Act records the finding that the parent of a child is mentally ill, the CWC would be justified in coming to the conclusion that the child is abandoned and therefore declare the child of such person as legally free for placement / adoption. If again for instance the Court in exercise of powers under Mental Health Act returns a finding that the alleged mentally ill person is likely to be cured of his illness, the CWC may or may not declare the child of such person legally free for placement / adoption. That again would depend upon the facts and circumstances of the case. For instance if it is found that the illness in any event is likely to be prolonged for an unreasonably long duration, the CWC would be justified in issuing the declaration under Section 41(5)(a) for otherwise the child would be deprived of rehabilitation during the most crucial and impressionable years of his life.

41. In the result it is only after the above

procedures under the Mental Health Act and the JJ Act culminating in a declaration by the CWC under Section 41(5)(a) of the JJ Act that petitions for the above reliefs can be presented under the Guardians and Wards Act, 1890.

42. The State Government may consider a suitable amendment / addition to the Maharashtra Juvenile Justice (Care and Protection of Children) Rules, 2002 and in particular Rules 78(viii) and (ix) thereof in view of this judgment.

43. The above Petitions are therefore dismissed with liberty to the Petitioners to file the Petitions afresh after complying with the above requirements.

44. The Petitioners shall be at liberty to withdraw the original documents filed in this Court upon the same being substituted by copies thereof duly authenticated by the Petitioner’s Advocate to be true copies.

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